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OCT 27 1975

In the Supreme Court of the United States

OCTOBER TERM, 1975

75-435

No. [redacted]

IN RE CESSNA AIRCRAFT DISTRIBUTORSHIP ANTITRUST LITIGATION

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1745

IN RE CESSNA AIRCRAFT DISTRIBUTORSHIP ANTITRUST LITIGATION

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

QUESTIONS PRESENTED

1. Whether the Eighth Circuit was correct in holding in accordance with the *Eisen IV* decision of this Court and the current position of the other Circuits that appealability under 28 U.S.C. 1291 of class certification is appropriate only if the requirements of the final order rule, as modified by the *Cohen* "collateral order" doctrine, are met?

2. Whether the Eighth Circuit was correct in applying the final judgment rule, as modified by the "collateral order" doctrine, rather than ruling as a matter of law that Robinson-Patman claims cannot be processed as class actions and that a former dealer can never be a class representative for a class including present dealers?

STATEMENT OF THE CASE

The District Court, following a hearing and numerous pre-trial conferences, directed that this action proceed as a class action with White Industries, Inc. serving as the class representative. It expressly retained, in accordance with the policy expressed in Rule 23, F.R.Civ.P., the authority to modify or alter the class action order. Petitioners sought early review of the class determination pursuant to 28 U.S.C. 1291. The Court of Appeals for the Eighth Circuit applied the final order rule, expressly evaluating the proposed appeal in light of the *Cohen* "collateral order" doctrine. In doing so it relied upon this Court's *Eisen IV* decision and the current authorities from all of the Circuits which had then passed upon the question of appealability of class certifications. It concluded that "the order here is not sufficiently 'final' or 'collateral' to justify appellate review at this time," *In Re Cessna Aircraft Distributorship Antitrust Litigation,* 518 F.2d 213, 215, and dismissed the appeal.

It is from that dismissal that petitioners now seek a writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

There Is No Conflict Among the Circuits

There is no conflict among the Circuits regarding the appealability of class certifications under 28 U.S.C. 1291. Particularly since this Court's decision in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974) (*Eisen IV*), the Circuits have demonstrated a marked uniformity in dealing

with attempted appeals from class certifications. They have uniformly recognized and placed a renewed emphasis on the policies of finality. *General Motors* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974); *Parkinson* v. *April Industries, Inc.*, CCH Fed. Sec. L. Rptr. par. 95,227 (2d Cir. 1975); *Handwerger* v. *Ginsberg*, CCH Fed. Sec. L. Rptr. par. 95,241 (summary only published) (2d Cir. 1975); *Fabrikant* v. *Stewart*, 64 F.R.D. 443 (S.D.Cal. 1974), appeal dismissed, ... F.2d ..... (9th Cir., filed May 19, 1975); *Seiffer* v. *Topsy's International, Inc.*, ... F.2d ..... (10th Cir., filed July 28, 1975); and the instant case, *In Re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213 (8th Cir. 1975).

While emphasizing the policies of finality, they have acknowledged the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) which this court reaffirmed in the context of class action issues in *Eisen IV*, *supra*, and have evaluated efforts to appeal class certifications in accordance with that doctrine.

Even prior to this Court's *Eisen IV* decision the Circuits which had passed on this question, with the exception of the Second Circuit, had uniformly applied the final order rule as modified by the *Cohen* collateral order doctrine. *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747 (3rd Cir. 1974), relying upon *Hackett* v. *General Host*, 455 F.2d 618 (3rd Cir. 1972); *Thill Securities Corp.* v. *New York Stock Exchange*, 469 F.2d 14 (7th Cir. 1972); *Walsh* v. *City of Detroit*, 412 F.2d 226 (6th Cir. 1969).

Petitioners' assertion of conflict among the Circuits is not and cannot be based upon the current authorities within the Circuits, for as to them there is no conflict. Rather, petitioners would have this Court believe that the pre-*Eisen IV* views expressed in two cases from the Second Circuit, *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d

1005 (2d Cir. 1973), and *Herbst* v. *International Telephone and Telegraph Corp.*, 495 F.2d 1308 (2d Cir. 1974), represent the current position of that Circuit and postulate their perceived conflict upon that proposition. This Court, of course, dealt with the question of appealability raised by the *Eisen* case and resolved it on the basis of the finality policy and the collateral order doctrine of *Cohen, supra.* As to the *Herbst* decision, the Second Circuit itself, in *Parkinson, supra,* note 6, pp. 98,194-98,195, has appropriately observed that that decision, expressing a broad rule favoring appealability, essentially represented the view of a single judge of the Circuit, Judge Lumbard, stating:

> Two other members of the panel, in separate concurrences, indicated that each of them had strong reservations as to interlocutory appealability, but concurred in the result because of the then sub judice status of Eisen III before the Supreme Court.

Further, at p. 98,196, note 8, the *Parkinson* court observed:

> The continuing precedential validity of Herbst in view of the decisions in Kohn and General Motors is an open question which is not now before us.

Herbst has been relegated, by the Second Circuit itself, to the "short evolutionary period" through which that Court passed before setting forth its "three-pronged" test of appealability, *Parkinson, supra,* at 98,194-98,195.

The post-*Eisen IV* position of the Second Circuit is clearly that expressed in *General Motors* v. *City of New York, supra,* and *Parkinson* v. *April Industries, Inc., supra.* The three-pronged test, enunciated in *General Motors, supra,* and applied and commented upon in *Parkinson, supra,* is entirely consistent with this Court's *Eisen IV* decision

and with the decisions of the other Circuits. A reading of *Parkinson, supra,* at 98,196 leaves no doubt:

> *Kohn* and *General Motors* in their application of the three pronged test mark a renewed emphasis on the policies of finality. As *General Motors* recognized, this result is encouraged, at least inferentially, by the Supreme Court's treatment of the jurisdictional questions presented in *Eisen* . . . .

Nor is the Second Circuit's formulation of the three-pronged rule a new exception to the policy of finality. *Parkinson, supra,* at 98,196, dispels any such notion:

> The Court, while creating the three-pronged test, has interpreted its elements most restrictively, an approach upon analysis which we find to be appropriate in light of the sound policies of finality. Indeed, the three-pronged test, narrowly interpreted, does not mark a departure from the final judgment rule, nor does it create a new exception to that general rule, but rather, it is a corollary to the collateral order doctrine tailored to the particular circumstances of class litigation.

That the current position of the Second Circuit is not in conflict with that of the other Circuits is underscored by the fact that the other Circuits have cited in support of their own decisions on class certification appealability the post-*Eisen IV General Motors* case. *In Re Cessna Aircraft Distributorship Antitrust Litigation,* 518 F.2d 213 (8th Cir. 1975); *Fabrikant* v. *Stewart,* 64 F.R.D. 443 (S.D. Cal. 1974), appeal dismissed, ... F.2d ..... (9th Cir., filed May 19, 1975); *Seiffer* v. *Topsy's International, Inc.,* ..... F.2d ..... (10th Cir., filed July 28, 1975).

It is clear that the "conflict" asserted by petitioners is only an imagined one and that the Circuits, particularly

since *Eisen IV*, have matched step in their treatment of attempted 1291 appeals of class certifications. There is, therefore, no need to resolve any conflict among the Circuits on this point.

II.

The Eighth Circuit Did Not Ignore Important Pragmatic Considerations

A. The Asserted " 'Gargantuan' Impact."

Petitioners' argument under the heading of " 'gargantuan impact" amounts to nothing more than an assertion that all certifications of big class actions should be immediately and automatically appealable under 28 U.S.C. 1291. While reciting that this early appellate review would be limited "to situations where the legal issues being appealed are 'separable from the merits,' " petitioners fail to disclose how the factor of size permits this separation. Further, it cannot be contended in good faith that the Eighth Circuit ignored this assertion. It expressly examined the record on this point in accordance with the *Cohen* doctrine, the heart of which is reviewability for an issue "separable from the merits," and concluded, at 215:

> Our examination of the record in this case and the nature of an order granting class action status under Rule 23 convinces us that the order here is not sufficiently "final" or "collateral" to justify appellate review at this time.

B. The Asserted "Separability of Class Issues From Merits."

Under this heading petitioners assert two things: (1) That the Eighth Circuit should have ruled as a matter of law that no Robinson-Patman Act cases can be brought

as class actions; and (2) That as a matter of law a former dealer can never act as a class representative for present dealers.

With regard to the first assertion, petitioners' statement, at page 7 of their brief, that "[t]en federal precedents decided in the last three years *hold* that Robinson-Patman Act cases are *inherently unsuitable for class action treatment* because of the numerous individual issues necessarily involved" is patently false. (Emphasis supplied). Of its ten cited cases, one does not even deal with the Robinson-Patman Act, *McMackin* v. *Schwinn Bicycle Co.*, 1974-1 CCH Trade Cases, par. 75,047 (N.D. Ill. 1974). And none of the other nine even so much as hint, much less "hold" that there is anything peculiar about a Robinson-Patman claim that makes class treatment unsuitable. Rather, each turns on an evaluation of the particular facts presented. Two of those cases expressly acknowledge the Tenth Circuit's *Gold Strike Stamp Co.* v. *Christensen*, 436 F.2d 791 (10th Cir. 1970), which found the facts of the Robinson-Patman claim there alleged to be appropriate for class treatment, *Albertsons, Inc.* v. *Amalgamated Sugar Co.*, 62 F.R.D. 43 (D. Utah 1973), and *Bel Air Markets* v. *Foremost Dairies, Inc.*, 55 F.R.D. 538 (N.D. Cal. 1972).

Only by now asserting that the Eighth Circuit should have ruled out class treatment of Robinson-Patman cases as a matter of law can petitioners avoid the dilemma of diving into the merits on their desired early appeal. However, such a ruling is not only unsupported by any authority, it is directly contrary to the standards of Rule 23 and to the policy expressed in The Advisory Committee's Notes, 39 F.R.D. 73, 102 (1966). The Advisory Committee's Notes, at 102 expressly suggest the use of class action treatment in price discrimination cases. The Eighth Circuit properly refused to rule as a matter of law that

Robinson-Patman cases can never be processed as class actions. Once that position is taken, there can be no dispute that if the Eighth Circuit had entertained the question whether this particular Robinson-Patman case was appropriate for class processing "it would be plunging headlong into the merits of the case," *In Re Cessna Aircraft Distributorship Antitrust Litigation, supra,* at 216.

With regard to the second assertion, even the authorities upon which petitioners rely do not establish the hard-and-fast rule petitioners suggest. Whether a representative party will fairly and adequately represent the class is a factual question. Determination of this question must be based upon evidence in the record and not upon mere speculation; and this principle was recognized by both the District Court and Court of Appeals in this case. *McMackin* v. *Schwinn Bicycle Co.*, 1974-2 CCH Trade Cases, par. 75,047 (N.D. Ill. 1974), at page 96,690, one of the authorities relied upon by petitioners, states:

> It should be emphasized that the Court does not adopt the notion that a former franchisee may never represent a class that includes present franchisees. Such a *per se* rule would be counter to the standards and purpose of Rule 23. . . . Each case must be considered on its own facts.

This same principle is enunciated in 7 Wright & Miller, Federal Practice and Procedure, Civil: § 1765 at 622: ". . . what constitutes adequate representation is a question of fact that depends on the circumstances of each case."

As to this factual issue the Eighth Circuit appropriately ruled that it was not so divorced from the merits that effective review could not be had after a final judgment is entered, and further, that to entertain it now would plunge the reviewing court into the merits.

Neither of the two issues asserted is capable of determination as a matter of law. And neither can be factually determined without delving deeply into the merits, as petitioners' Eighth Circuit briefs, which dealt almost exclusively with the merits, so aptly illustrate.

C. The Asserted "Futility of Post-Verdict Appeal: Robinson-Patman Class Issue."

Under this heading petitioners phrase, albeit in somewhat different terms, merely another pitch for instant appealability under 28 U.S.C. 1291 of class certifications in all big class cases. The lack of support for this proposition has already been demonstrated. However, petitioners do not stop there. Apparently unable to resist getting into the merits they parade out their merit arguments from the Eighth Circuit briefs and suggest manageability problems and increased costs which will result from them. These are the very matters which defy effective appellate review without full development of the record by trial on the merits. For the Eight Circuit to have passed upon the propriety of the class determination on the basis of petitioners' merit contentions would have been to engage in pure speculation and conjecture. It appropriately resisted that invitation.

D. The Asserted "Futility of Post-Verdict Appeal: Terminated Dealer Class Issue."

Under this heading petitioners restate their position that a former dealer should never be permitted to act as class representative for a class which includes present dealers. They contend that the mere maintenance of the class action with White Industries as the class representative jeopardizes the interests of the current Cessna dealers. The factual record developed before the District Court

refutes this contention, and the District Court made the express finding on the basis of that record that White Industries will fairly and adequately represent the class, including the current dealers. Further, the Court of Appeals when presented with this same contention stated, at 216:

> Obviously, if this court were to entertain these issues, it would be plunging headlong into the merits of the case. Each of these issues can be raised and fully ventilated on appeal following a final judgment. Consideration at this time would serve no justifiable judicial purpose.

If every significant fact finding decision by a District Court were immediately reviewable under 28 U.S.C. 1291 the salutary final judgment rule would be a dead letter.

CONCLUSION

There is no conflict among the Circuits. The opinion of the court below is correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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